IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

BRYAN MATTHEW GILLIAM,
Petitioner.

No. 2 CA-CR 2014-0263-PR
Filed September 16, 2014

Petition for Review from the Superior Court in Maricopa County
No. CR2007175000002DT
The Honorable Joseph Kreamer, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Karen Kemper, Deputy County Attorney, Phoenix
Counsel for Respondent

Droban & Company, PC, Anthem
By Kerrie M. Droban
Counsel for Petitioner

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Chief Judge Eckerstrom and Presiding Judge Miller concurred.

E S P I N O S A, Judge:

¶1 Bryan Gilliam seeks review of the trial court's order dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We grant review but deny relief.

¶2 Gilliam was convicted after a jury trial of second-degree murder, aggravated assault, and two counts of endangerment. He additionally pled guilty to weapons misconduct, specifically, possession of a firearm by a prohibited possessor. The trial court imposed a combination of concurrent and consecutive, enhanced prison terms totaling forty-three years, including a fourteen-year sentence for weapons misconduct. On appeal, we affirmed his trial convictions and sentences. *State v. Gilliam*, Nos. 1 CA-CR 10-0721, 1 CA-CR 11-0116 (memorandum decision filed July 24, 2012).

¶3 Gilliam then sought post-conviction relief. The claims raised in his petition arise from his overarching contention that his 2004 conviction for criminal trespass is invalid.[1] He explained in his petition that his guilty plea in that matter was entered pursuant to former A.R.S. § 13-3601(M),[2] which provided that the charge would

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[1]The trial court additionally found, and Gilliam does not contest, that he has prior felony convictions for theft committed on November 8, 1992, third-degree burglary committed on December 4, 1992, and theft committed on January 5, 1993.

[2]That subsection provided, in pertinent part, that:

be dismissed upon Gilliam's successful completion of probation, and that he had completed probation.[3]

¶4 Gilliam provided a copy of his plea agreement, which cited § 13-3601(M) and stated the trial court "shall defer further proceedings, not enter a judg[]ment of guilty, and place the defendant on supervised probation," and that the court shall "discharge [Gilliam] and dismiss the proceedings against" him should he successfully complete probation. Gilliam also provided a copy of a minute entry for that conviction, in which the court stated it was "deferring judgment in this case" but nonetheless further provided "it is the judgment of the Court [that Gilliam] is guilty of" criminal trespass in the first degree, a class six felony. In that minute

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> If the defendant is found guilty of an offense included in domestic violence and if probation is otherwise available for that offense, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation or intensive probation, as provided in this subsection. . . . On violation of a term or condition of probation or intensive probation, the court may enter an adjudication of guilt and proceed as otherwise provided for revocation of probation. On fulfillment of the terms and conditions of probation or intensive probation, the court shall discharge the defendant and dismiss the proceedings against the defendant.

2001 Ariz. Sess. Laws, ch. 334, § 20.

[3]Gilliam limited his arguments in this petition for review to his conviction by guilty plea and sentence for weapons misconduct. Thus, his claims are not subject to preclusion for failure to raise them on appeal. *See* Ariz. R. Crim. P. 32.1; 32.2(a).

entry, the court also "suspend[ed] imposition of sentence" and imposed an eighteen-month term of probation. Finally, Gilliam provided a form "order of discharge from probation," signed by the court, which stated that he had complied with the terms of probation and "is hereby discharged from probation." However, the box on the form that would have ordered, "pursuant to A.R.S. Sec. 13-3601(M)[,] . . . all proceedings against the defendant in this cause are dismissed" was not checked. Gilliam reasoned that, based on those documents, "[a] judgment of guilt was never entered" and that the court had "erroneously failed to dismiss the proceedings" as required by § 13-3106(M).

¶5 Relying on his claim that his 2004 conviction was invalid, Gilliam argued (1) the trial court had improperly enhanced his sentence for weapons misconduct because he had only one, not two, qualifying prior felony convictions; (2) his guilty plea must be set aside because he was not a prohibited possessor; and (3) his trial counsel was ineffective for failing to raise the issue and in recommending that he admit the prior conviction for criminal damage and plead guilty to weapons misconduct. He additionally claimed his "plea allowed him to be impeached during the trial proceedings on the remaining counts" which "likely . . . negatively impacted the jury's decision to convict."

¶6 The trial court summarily denied relief, finding that Gilliam's 1993 felony conviction "properly formed the basis of his prohibited possessor status" and that, in any event, his 2004 conviction was valid because the judge in that case "did not check the box on the relevant order that would have ordered dismissal." Thus, the court concluded, Gilliam "did have two historical priors" and his sentence was properly enhanced.

¶7 On review, Gilliam restates his claims. We first address his contention that his plea for weapons misconduct must be set aside because his 2004 conviction is invalid and, thus, he is not a prohibited possessor. A person commits weapons misconduct by knowingly "[p]ossessing a deadly weapon or prohibited weapon if

such person is a prohibited possessor." A.R.S. § 13-3102(A)(4).[4] A person is a prohibited possessor if he or she "has been convicted within or without this state of a felony . . . and whose civil right to possess or carry a gun or firearm has not been restored." A.R.S. § 13-3101(A)(7)(b). Section 13-904(A)(5), A.R.S., in turn, provides that "[a] conviction for a felony suspends" a person's "right to possess a gun or firearm."

¶8 Even were Gilliam correct that his 2004 conviction is invalid, the trial court properly concluded that he nonetheless is a prohibited possessor. Gilliam claims that his 1992 and 1993 felony convictions did not render him a prohibited possessor because the version of § 13-904 in effect at that time did not suspend his right to possess a gun or firearm—that provision was not added to § 13-904 until 1994. *See* 1994 Ariz. Sess. Laws, ch. 200, § 5; *see also* §§ 13-3101(A)(7)(b); 13-3102(A)(4). Although Gilliam correctly describes the state of the law in 1992 and 1993, that law is not relevant. In *State v. Olvera*, this court determined that a defendant who had committed a felony in 1992 was nonetheless a prohibited possessor following the 1994 change to § 13-904. 191 Ariz. 75, 77, 952 P.2d 313, 315 (App. 1997). We reasoned that the statute is regulatory in nature and that the revision merely made the defendant "a felon whose right to possess a firearm was suspended." *Id.* The same reasoning applies to Gilliam—the existence of his 1992 and 1993 felony convictions made him a prohibited possessor when § 13-904 was amended in 1994. Accordingly, because there is no basis to set aside his plea for weapons misconduct, we reject that claim and his related one that he was improperly impeached at trial with that conviction.

¶9 Gilliam further argues that his 2004 conviction cannot serve as a historical prior felony conviction because it should have been dismissed pursuant to former § 13-3601(M). Thus, he maintains, absent that conviction, the trial court erred in sentencing him for weapons misconduct as a repetitive offender having two or more historical prior felony convictions. *See former* A.R.S. §§ 13-

[4] Unless otherwise noted, we cite the current version of applicable statutes because no provision has materially changed.

604(W)(2)(d) (defining historical prior felony conviction as "[a]ny felony conviction that is a third or more prior felony conviction"); 13-702.01(E) (fifteen-year maximum sentence for class four felony committed by person with "two or more historical prior felony convictions").[5]

¶10 We agree with Gilliam that, in light of former § 13-3601(M) and the documents he provided related to his 2004 conviction, it appears that proceeding should have been dismissed upon his successful completion of probation. But those documents also show that did not occur—as the trial court correctly noted, the order discharging Gilliam from probation did not dismiss the proceedings against him. A defendant is precluded from collaterally attacking a counseled,[6] facially valid prior conviction when that prior conviction is applied to enhance the sentence for a later offense. *State ex rel. Collins v. Superior Court*, 157 Ariz. 71, 75-76, 754 P.2d 1346, 1350-51 (1988). Gilliam cites no authority, and we find none, suggesting a trial court's failure to dismiss a proceeding renders a conviction facially invalid. Instead, a defendant must raise the objection in the original proceeding or in post-conviction relief proceedings. *See id.* Thus, we reject Gilliam's argument that his 2004 conviction is improper because the proceeding should have been dismissed, but was not.

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[5]2007 Ariz. Sess. Laws, ch. 248, § 1 (former § 13-604); 2006 Ariz. Sess. Laws, ch. 148, § 2 (former § 13-702.01). Gilliam's 1993 theft conviction is his third felony conviction and constitutes his first historical prior felony conviction. His 1992 offenses are too remote in time. *See former* § 13-604(W)(2)(b), (c). The state alleged before trial that Gilliam also had a 1993 conviction for criminal damage, committed on the same date as the theft. The trial court's sentencing minute entry, however, does not contain a finding related to that conviction. And, as the state acknowledges, that felony appears to have been committed on the same occasion as the theft and therefore is not a historical prior felony conviction separate from the theft conviction. *See former* § 13-604(M).

[6]The documents Gilliam provided show he was represented by counsel during his 2004 proceeding.

¶11 Gilliam, however, further argues a judgment of guilt was never entered in the 2004 proceeding, apparently suggesting the conviction therefore never occurred at all. A "judgment," as defined by our criminal rules, is "the adjudication of the court based upon the verdict of the jury, upon the plea of the defendant, or upon its own finding following a non-jury trial, that the defendant is guilty or not guilty." Ariz. R. Crim. P. 26.1(a). The orders entered in the 2004 case are somewhat unclear. The order placing Gilliam on probation stated both that the entry of judgment was deferred and that "it is the judgment of the court" that Gilliam "is guilty" of criminal trespass. And the order discharging him from probation noted he had been "adjudged guilty" of criminal trespass.

¶12 But we need not resolve these inconsistencies because our supreme court has drawn a distinction between conviction and the entry of judgment. In *State v. Green*, the court determined that a defendant who had committed an offense while on probation pursuant § 13-3601(H), later reordered to subsection (M),[7] was on "probation for a conviction of a felony offense" for sentence enhancement purposes. 174 Ariz. 586, 588, 852 P.2d 401, 403 (1993). The court noted that, "[i]n the popular sense of the term, conviction means that the defendant has 'been found guilty or has pleaded guilty, although there has been no sentence or judgment by the court.'" *Id.* at 587, 852 P.2d at 402, *quoting State v. Vincent*, 197 A.2d 79, 82 (Conn. Super. Ct. 1961); *see also State v. Thompson*, 200 Ariz. 439, ¶ 7, 27 P.3d 796, 798 (2001) ("One is convicted when there has been a determination of guilt by verdict, finding, or the acceptance of a plea."); *State v. Walden*, 183 Ariz. 595, 615, 905 P.2d 974, 994 (1995) ("Historically, the term 'conviction' has meant a determination of guilt rather than the formal entry of judgment."), *overruled on other grounds by State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996).

[7] Subsection 13-3601(H) was reordered as subsection 13-3601(M) in 1996. 1996 Ariz. Sess. Laws, ch. 87, § 1.

¶13 Arizona's sentencing statutes do not define the term "conviction,"[8] and in the absence of a statutory definition we must construe the term "according to the common and approved use of the language." A.R.S. § 1-213. Our supreme court's explanation means, based on the common understanding of the term, that Gilliam was convicted of criminal trespass when he admitted his guilt for that offense, even assuming formal judgment was never entered. The proceeding was never dismissed. Accordingly, Gilliam had been convicted of that offense, and the trial court properly treated it as a historical prior felony conviction for sentencing purposes. Gilliam's related claim of ineffective assistance of counsel also fails, because counsel would have had no basis to challenge the conviction at sentencing. *See Collins*, 157 Ariz. at 75-76, 754 P.2d at 1350-51.

¶14 Although review is granted, relief is denied.

[8]As our supreme court observed in *Green*, our legislature has, in other contexts, "defined conviction as occurring after judgment has been entered, at other times it has, consistent with the popular meaning of the word, defined conviction as occurring after a determination of guilt is made." 174 Ariz. at 587, 852 P.2d at 402 (citation omitted).